No. 14641

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

FLORENCE LILLIAN FLUMERFELT,
*Appellant*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

---

HONORABLE WILLIAM J. LINDBERG, *Judge*

---

## APPELLANTS OPENING BRIEF

---

JOHN E. BELCHER
*Attoney for Appellant.*

Office and Post Office Address:
1201 Northern Life Tower
Seattle 1, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 4/15/55 — 45 COPIES

No. 14641

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

FLORENCE LILLIAN FLUMERFELT,
*Appellant*

VS.

UNITED STATES OF AMERICA,
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

---

HONORABLE WILLIAM J. LINDBERG, *Judge*

---

## APPELLANTS OPENING BRIEF

---

JOHN E. BELCHER
*Attoney for Appellant.*

Office and Post Office Address:
1201 Northern Life Tower
Seattle 1, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 4/15/55 — 45 COPIES

# INDEX



## TABLE OF CASES



## PUBLIC LAWS



## REMINGTON REVISED STATUTE

No. 14641

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

FLORENCE LILLIAN FLUMERFELT,
*Appellant*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

---

HONORABLE WILLIAM J. LINDBERG, *Judge*

---

## APPELLANTS OPENING BRIEF

---

## JURISDICTIONAL STATEMENT

The jurisdiction of the District Court is conferred by the provisions of Sec. 1331, Title 8 U.S.C.A., and of this court by Sec. 1291, Title 28, U.S.C.A.

## STATEMENT

This is an appeal from the order of the district court denying appellant's petition for citizenship, upon recommendation of a designated examiner, for alleged failure to establish good moral character for the period required by law. (R. 7, Sec. 9).

Appellant, a Canadian citizen, born September 4, 1927 at Orriville, Ontario, Canada was admitted to the United States for permanent residence at Detroit, Michigan April 5, 1948, filed in the district court her petition for naturalization (Alien Registration No. A 6899534) on June 1, 1953 (R. 3-6 with the affidavits of two American citizens as witnesses, to-wit: Ruby Chin Lew, a stenographer, residing in Seattle and Reba Parker, an ice cream packer, residing in Seattle, who each swore, on oath, they had been acquainted with appellant since May 1949 and March 1949, and that each had personal knowledge that appellant is and has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States (R. 5, 6).

On February 9, 1954, at Seattle appellant appeared before Examiner Sullivan and Miller at the Immigration Station, Seattle and was examined under oath (R. 12-20).

During the examination appellant frankly admitted that she had *on one occasion* in November 1952 had sexual relations with one James Wong (R. 34) an American citizen of Chinese extraction. The examiner recommended denial of the appellant's petition on sole ground — "For failure to establish good moral character for the period required by law" (R. 8, No. 8, 45554).

Appellant was accorded a hearing in the District Court November 15, 1954, at which she was sworn on oath and testified in her own behalf, and fully explained the circumstances under which this *one and only one* indiscretion occurred (R. 24-38).

The District Judge sustained the recommendation of the examiner, and by an order on a printed form containing nine other petitions, denied the petition of appellant (R. 7).

From this indefinite order, appellant filed her notice of appeal (R. 10) December 14, 1954.

## APPELLANT'S POINTS ON APPEAL

1. The District Court abused its discretion in following the recommendation of the Examiner in holding that appellant had failed to establish good moral character.
2. The District Court erred in denying appellant admission to citizenship.

## THE EVIDENCE

Appellant was examined under oath at Seattle February 9, 1954 by Examiners Ray S. Sullivan and Fay L. Miller.

In the course of her examination she stated she had been known by and had used the name of Lynn Perry. She was asked:

Q. How does it happen you used the name Perry?

A. In Los Angeles I took up singing and the woman that taught me suggested that I use the name Perry from Perry Sound. I studied two months or so. (R. 13).

Q. Do you use the name Perry at all?

A. No, sir. (R. 13).

Appellant's occupation has been that of waitress (R. 13) but she is presently going to school studying hairdressing and most of her years of employment as a waitress has been in Chinese restaurants. (R. 13-14).

Mr. Miller in his examination of petitioner undertook to develop grounds to establish lack of "good moral character" and by inuendo and suggestion attempted to develop that petitioner was a prostitute and that the place where she lived was a place where people of questionable character lived and congregated.

She was asked this question by Mr. Miller:

Q. Can you, for the record, offer any explanation

as to why you, a white girl, have associated with the Chinese race since you came to the United States? (R. 16).

A. When I first came to Seattle, Reba, my witness, and I were both broke and the International League sent us looking for a job. I got a job at the Riceland Cafe. I met Ruby Chin, who was my witness, and met other people who were wonderful to me. And it is through all my Chinese friends that I have gotten my job. I like them and I am well liked. If you have been good to them, there is no reason to say I don't want to see you. (R. 16).

She was asked:

Q. Are you willing to state under oath that you have never served as a "call girl" or prostitute?

A. *I certainly am.* (R. 17).

Appellant frankly admitted having had sexual relations with a Chinese male on one occasion only.

Based upon this record, Mr. Sullivan on June 15, 1954 sent notice to petitioner of his proposed recommendation of denial of her petition for naturalization "*For failure to establish good moral character for the period required by law.*"

## THE LAW

Sec. 316(a) of Public Law 414.66 Stat. 242 in part provides:

(3) "* * * during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

In the petition for naturalization on page 2 thereof (18) we find this:

"The law provides that no person shall be regarded as a person of good moral character who, during the period of residence required for naturalization, is or was an *habitual drunkard;* has *committed adultery; derived income from illegal gambling; has given false testimony* for the purpose of obtaining benefits under the immigration and naturalization laws; is or was a polygamist or practiced or advocated polygamy; *is or was a prostitute, or engaged in or received support or the proceeds from prostitution* or procured or imported or attempted to procure or import persons for prostitution or any immoral purposes or who came to the United States to engage in any other unlawful commercialized vice * * *; who knowingly and for gain encouraged or aided any alien to enter the United States illegally; who has committed a crime involving moral turpitude; or is or has been an illicit trafficker of narcotic drugs."

After setting forth the above, the form then poses this question: "Have you at any time, either within or outside the United States, ever been or ever committed any of these things or acts? To which petitioner answered "*No*".

## ARGUMENT

This case is governed by the law in effect at the time of the filing of appellant's petition on the 1st day of June 1953 (R. 3-6), to-wit Sec. 1427(a)(3), Title 8 U.S.C.A., which reads:

> "No persons, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner * * * (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

We are here concerned only with the question whether appellant is a person of "good moral character."

The statute does not precisely define that term.

At least one district court in California has said that the term "good moral character" is not a term of technical legal connotation, but it had to be viewed in the light of the standards of society and the conduct of average men of the community in which alien seeking naturalization resided.

> *Application of Barug* (D.C. Cal. 1948) 76 F. Supp. 607.

The appellant frankly admitted in her examination in February 1954 that she had had a single act

of sexual intercourse with a certain American citizen of Chinese extraction (R. 29).

Was that adultery?

Under the laws of the State of Washington adultery is a crime. The statute Rem. Rev. Stat. Sec. 2457 provides:

> "Wherever any *married person* shall have sexual intercourse with any person other than his or her lawful spouse *both such persons shall be guilty of adultery* * * *"
>
> (Cited in 51 Wash. 572, and 64 Wash. 416, 106 Wash. 336, 339, 112 Wash. 694).

Appellant did not know when this single act took place or that the other person was married (R. 31).

Appellant is a *single woman and* therefore does not come within the purview of the statute.

In the Washington case of *State v. LaBounty*, 64 Wash. 415 and in *State v. Astin* (1919) 106 Wash. 336 it was held that the intent of the Legislature is to regard adultery as a crime against the *husband or wife* rather *than a crime against society*, leaving it to the husband or wife to condone the offense, unembarrassed by the publicity incident to the prosecution by the officers of the State.

In the Astin case it was held that no prosecution for adultery shall be commenced except on complaint

of the injured spouse, but such spouse, having made the complaint, has no right to dismiss it, or control the prosecution. Here, however, there is no evidence of prosecution.

The Washington court has held also, that *marriage is an essential element* of the crime and cannot be inferred from the circumstances.

*State v. Wheeler* (1916) 93 Wash. 538.

In the Department of Justice, Immigration and Naturalization Service "Monthly Review, Vol. VI, No. 5, November 1948 at page 69 under G-M-M A. 6816388, B. 1. A., 4/20/46 we find this

"*Immoral purpose* — Entry for—

(1) An alien coming to the United States for two days to visit her fiance, with whom she had been engaged in sexual relations in this country, cannot be found to be coming to this country to live in a state of concubinage because of the time element involved and consequently is not excludable as entering for an immoral purpose.

(2) Where an alien's primary reason in entering is to visit a fiance and only incidentally to engage in sexual activities, she is not excludable as one entering for an immoral purpose."

In passing upon "moral character" of petitioner for naturalization courts have taken a liberal view of sexual behavior.

In *re Anzalone* (N.J.) 107 F. Supp. 770.

The Supreme Court of the United States, in the case of *Hanson v. Haff*, 291 U.S. 559 (1954) held that the words "immoral purpose" as used in Section 3 of the Act of February 5, 1917 relate to activities which are of like character with prostitution. *It went on to say that "extra marital relations" short of concubinage, fall short of that description* (562).

It is apparent from the examination had in February 1954 that the Examiner's prejudice is shown because that act of sexual intercourse admitted was with a male member of the Chinese race.

It would seem therefore that to deny citizenship to petitioner because of a *single act* of sexual intercourse *which she frankly admitted*, as so clearly shown by the authorities cited falls far short of saying that petitioner is not a person of good moral character, and without more, the court, in the exercise of its discretion in such matters, if the applicant has otherwise met the requirements of the law, should have overruled the recommendation of the examiner, or at least continued the matter for a few months from this quite innocent infraction.

Had she denied the act, which could only be definitely proven by the two parties involved, a different question would be involved provided the examiner was

able to prove the act and therefore show she had perjured herself. But appellant frankly admitted the act, and on her examination before the court at least showed the extenuating circumstances, which so far as moral character is concerned redounds to her credit and is strong evidence of that kind of good moral character to which the statute refers and as measured by the Board of Immigration Appeals in the case cited herein.

Petitioner denied prostitution and unless the government has some evidence of acts of prostitution on her part or other acts coming within the terms of the statute it would seem to be a *straining beyond* the limit of logic that one should be denied citizenship because of a single admitted act of indiscretion falling far short of any of the things mentioned in the statute which are grounds for denial of citizenship.

Suspicion alone without more is wholly insufficient.

Citizenship is not a matter of right but a privilege extended by a humane government upon such terms as it may choose and a painstaking search of the authorities has failed to disclose a single case over the years where any alien has been denied that coveted privilege on so flimsy a ground as contained in the recommendation of the examiner in this case. In

fact the attitude of the Board of Immigration Appeals is to the exact contrary.

It has been ad administrative policy of long standing not to sustain a ground of exclusion (Cf. matter of G-A 4108657 B.1.A. May 9, 1944) or a ground of deportation (Cf. matter of C-A. 9663533 nor A - 1232140, C.O. Jan. 23, 1946) arising as a result of an alien's admission of the commission of the crime of adultery in the absence of a conviction thereof.

*In the matter of A — In deportation proceedings* A - 1636772 Feb. 9, 1948 Vol. III Ad. Dec. under I and N Laws of the United States p. 168.

In *Schmidt v. United States*, 177 F. (2d) 450 from the Second Circuit, it appears that Schmidt, a native of Germany was admitted to the United States for permanent residence on January 17, 1939; he was examined by Immigration officials and as the appellate court say, "in a moment of what may have been unnecessary frankness, he verified an affidavit before the examiner, which contained the following passage: 'Now and then I engaged in an act of sexual intercourse with women. These women have been single and unmarried women. As to the frequency of these acts I can only state that they occurred now and then. My last such act took place about a half a year ago with an unmarried woman.' *The only question in the*

*case is whether by this admission the alien showed that he was not a person of good moral character.*"

The District Court had denied petitioner's application. The Court of Appeals, L. Hand, Chief Judge, reversed and granted the petitioner's application for citizenship.

> See also *Petition of Rudder* et al (2d Cir., 1949) 159 F. (2d) 695.

In those cases the District Court had admitted to citizenship four aliens over the objection of the examiner who had recommended denial in each case on the ground that the petitioners had not established good moral character, which recommendation the District Court had overruled. The United States appealed and the Court of Appeals affirmed.

While not dealing with the question of sexual relations, the opinion of Judge St. Sure, of the District Court of the Northern District of California, Southern Division in the cast of *In re Paoli*, 49 F. Supp. 128 shows the liberality in recent years.

In *Estrin v. United States* (2 Cir.) 80 F. (2d) 105 the court there said:

> "I therefore conclude that proof that a petitioner had committed 'fornication' at least — the circumstances in this case is not an adequate ground

> for saying that the petitioner is not 'of good moral character.' I do not find it necessary to decide whether it would be ground for denying citizenship if a petitioner had committed fornication for commercial motives or with a minor, or under circumstances different from those here involved. Petition for citizenship granted.

Another district court held that "good moral character" as used in former Section 707 of this title was not susceptible to a precise, uncircumscribed definition, and did not mean "moral excellence" but it did require that an alien affirmatively establish good moral character up to the standard of the average citizen.

*Petition of Gani* (A.C. La. 1949) 86 F. Supp. 683.

Judge St. Sure, *In re Poali*, 49 Supp. 128 (131) said:

> "In the present case there is only one black mark against the petitioner, and while his act is defined as a felony, he was never punished as a felon, for the court considered him a good risk for probation and, as the subsequent dismissal indicates, was justified in his opinion. The violation was not a vicious one or one which necessarily involved moral turpitude; it was purely a statutory crime. Applicant has apparently conducted himself properly for more than four years since his conviction. The motion of the Government is denied, and petitioner will be admitted to citizenship upon taking the required oath."

It is respectfully submitted that the appellant proved her good moral character when she admitted this *one* infraction rather than to perjure herself.

Respectfully submitted,

JOHN E. BELCHER
*Attorney for Appellant*